Duke University *and* Amalgamated Transit Union, Local 1328. Case 11–CA–15596

January 13, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On March 24, 1994, Administrative Law Judge J. Pargen Robertson issued the attached decision. The Respondent filed exceptions and a supporting brief; the General Counsel filed an answering brief; and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the Order as modified.[2]

The judge found and we agree that the Respondent unilaterally changed working conditions by removing regular and overtime work from bargaining unit employees and unilaterally changing its methods of assigning regular work and overtime. The judge's remedy provides that the Respondent must restore the status quo ante and rescind the unilateral changes made after the August 1991 election and make all affected unit employees whole for any losses they incurred. In adopting the judge's Order, we emphasize that the status quo ante remedy includes restoration of the unit to what it would have been without the unlawful changes.

The Respondent's unfair labor practices—particularly its unilateral decision to cease hiring full-time drivers and instead hire permanent part-time drivers—were the direct and proximate cause of the diminution of the unit's ranks from 13 employees prior to the election to 7 at the time of the hearing. In ordering that the unit be restored, we seek to undo the effects of the Respondent's unlawful acts.[3]

The Respondent will be permitted to introduce evidence at the compliance stage of this proceeding regarding the appropriateness of the restoration portion of the remedy. As discussed in *We Can, Inc.*, 315 NLRB No. 24 (Sept. 30, 1994), we recognize that posttrial events may establish that a portion of the remedy imposed by the Board is no longer appropriate. Thus, if the Respondent has evidence that was unavailable at the time of the hearing bearing on appropriateness of this remedy, it may introduce that evidence during compliance. *Lear Siegler, Inc.*, 295 NLRB 857 (1989).[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Duke University, Durham, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 2(a) and (b) and reletter subsequent paragraphs.

''(a) On request bargain in good faith with the Union concerning the decision to employ permanent part-time drivers, rescind the unilateral changes affecting bargaining unit employees that were made after the August 1991 election and restore the status quo ante

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Having adopted the judge's credibility findings with respect to the testimony of full-time drivers Louise Davis and Melton Thompson and International Vice President of Amalgamated Transit Union Tommy Mullins, we agree that the Union did not have actual notice of the Respondent's unfair labor practices prior to 1993. We further find that there is no basis for concluding that the Union should have known of the conduct before July 1993. As the judge found, the Respondent was refusing to recognize the Union at the relevant times, and thus the Union was not able to perform its function as collective-bargaining representative. *Clark Equipment Co.*, 278 NLRB 498 (1986).

The Respondent also relies on *Southeastern Michigan Gas*, 198 NLRB 1221 fn. 2 (1972). In that case, the Board left open the issue of whether the 10(b) period would begin to run only on notice to the union when the changes are not open and obvious. The Respondent apparently infers from this that the 10(b) period would begin to run *prior* to notice to the union, i.e., on notice to employees, where the changes are open and obvious to the employees. Whatever the merit of this interpretation, it has no relevance here. The changes here were not open and obvious to employees until within the 10(b) period. The nature of the Respondent's policy changes at issue here were subtle and evolving, the full impact of which could not readily be appreciated by the employees outside the 10(b) period.

[2] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[3] See *Land O'Lakes*, 299 NLRB 982 (1990), where the respondent unilaterally removed the classification of maintenance purchasing mechanic/maintenance storeroom attendant from the unit and changed it to a salaried position without bargaining with the Union and assigned bargaining unit work to a supervisor. The new supervisor continued to do unit work and the removal of work from the unit resulted in an employee being displaced. The Board found that the change had an impact on the bargaining unit and was a mandatory subject of bargaining and ordered the respondent to rescind the transfer which was the result of the unlawful change. See also *Goodman Investment Co.*, 292 NLRB 340 (1989), where the Board ordered certain afterhours cleaning work returned to the bargaining unit where the judge had found that the respondents manipulated the unit and its work to avoid performing the afterhours work with their own employees.

[4] In ordering restoration of the unit, we note that we are not necessarily requiring the hiring of additional employees or the displacement of current employees. Thus, it may be that the Respondent will be able to comply with our Order by converting or reclassifying its permanent part-time employees as regular full-time employees.

by restoring the unit to where it would have been without the unilateral changes, and make unit employees whole, with interest, for any losses they incurred by virtue of its unilateral changes from August 1991 until it negotiates in good faith with the Union to agreement or to a valid impasse in the manner set forth in the remedy section of this decision. The appropriate unit is:

> All full-time busdrivers employed by the Respondent at its campus at Durham, North Carolina, excluding supervisors as defined in the Act.

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
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> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain in good faith with Amalgamated Transit Union, Local 1328 as exclusive collective-bargaining representative in the below-described collective-bargaining unit, before implementing changes in working conditions that affect the following employees:

> All full-time bus drivers employed by us at our campus at Durham, North Carolina, excluding supervisors as defined in the Act.

WE WILL NOT unilaterally change working conditions affecting the above-described employees by refusing to employ full-time drivers; by employing permanent part-time drivers; by restricting the assignment of work to bargaining unit employees and others when those assignments affect bargaining unit employees; by changing the method of assigning overtime to bargaining unit employees; and by making overtime more difficult for bargaining unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL rescind unilaterally changed working conditions affecting the above-described employees including our practice of refusing to employ full-time drivers; our practice of employing permanent part-time drivers to perform bargaining unit work; our practice of assigning work to bargaining unit employees and others when those assignments affect bargaining unit employees; and our practice of assigning overtime bargaining unit work.

WE WILL make whole the unit employees for any loss of earnings and other benefits suffered as a result of the unilateral action, with interest.

DUKE UNIVERSITY

Jane P. North, Esq., for the General Counsel.
John M. Simpson, Esq. and *Jacqueline DePew, Esq.*, of Washington, D.C., for the Respondent.
Tommy N. Mullins, of Roanoke, Virginia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

J. PARGEN ROBERTSON, Administrative Law Judge. This hearing was held in Durham, North Carolina, on January 3, 1994. The charge was filed on August 10 and amended on September 23, 1993. The complaint issued September 27, 1993.

Respondent, the Charging Party, and the General Counsel were represented and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Respondent and General Counsel filed briefs. On consideration of the entire record and briefs, I make the following

FINDINGS OF FACT

Respondent admitted that it is a private nonprofit education institution with its main campus located in Durham, North Carolina, and that included within its operation is the Duke University Medical Center, which is an acute care hospital facility.

Respondent also admitted that during the past 12 months it received at Durham, North Carolina, gross revenue of at least $1 million, of which $50,000 was received from points outside the State of North Carolina and that it is now, and has been at material times, an employer engaged in commerce within the meaning of Section 2(5) of the National Labor Relations Act (the Act). Respondent admitted that the Charging Party (Union) is a labor organization within the meaning of Section 2(5) of the Act.

Respondent admitted that employees voted in a secret ballot election on August 29, 1991, and on March 30, 1992, the Union was certified as the exclusive collective-bargaining representative for the following described bargaining unit employees:

> All full time bus drivers employed by the Respondent at its campus at Durham, North Carolina, excluding supervisors as defined in the Act.

After certification, Respondent refused to bargain with the Union. Charges were filed, the matter was litigated and the National Labor Relations Board (Board) found that Respondent violated Section 8(a)(1) and (5) by refusing to recognize and bargain with the Union. That matter is pending on petition for review in a court of appeals.

In its brief Respondent argued that this case should be held in abeyance pending the court of appeals ruling. I have considered that argument but find it does not justify holding this matter in abeyance.

The General Counsel argued that the heart of this case deals with an alleged diminution of bargaining unit positions. The complaint alleged that Respondent unilaterally removed regular and overtime work from bargaining unit employees and that Respondent unilaterally changed the manner of assigning routes to drivers.

The bargaining unit includes only full-time drivers. Before the certification of the Union, Respondent employed full-time and some part-time drivers. The part-time drivers included student drivers. Some were Duke students and some were from other schools.

The General Counsel argued that since the certification Respondent has not filled full-time driver positions. Instead Respondent has hired part-time drivers that are not students. Because of that practice the number of unit employees (i.e., full-time busdrivers) has dropped from 13 to 7.

Respondent argued that it has not engaged in conduct in violation of the Act and moreover this matter is barred by Section 10(b) of the Act.

The 10(b) Question

As shown here Louise Davis testified at the hearing that she did not notify the Union of changes in working conditions. In a prehearing affidavit she gave Respondent, Davis testified that she was phoned by a woman from the Union that she believed was a lawyer. At the hearing Davis testified that woman was actually Margaret Rafferty, an agent of the NLRB. Davis was able to recall the woman's name after that name was mentioned to her by counsel for General Counsel.

Melton Thompson testified at the hearing that he first contacted Tommy Mullins of the Union in the summer of 1993. In a prehearing affidavit, which is partly quoted below under findings, Thompson testified that he phoned Mullins on occasions before 1993 and told Mullins of problems at work.

Alleged Diminution of Unit Positions

Manager of Operations Mark Neilson testified that in September 1991 Respondent employed 13 full-time busdrivers. There were also part-time drivers employed at that time. Director of Transportation Services Majestic testified that the term part time was used at the time of the election in August 1991, to mean casual part-time drivers—students from Duke, Duke graduates, and students from other colleges.

There have been vacancies in bargaining unit positions since the August 1991 election. In January 1992, one of the full-time drivers became a supervisor. One full-time employee ceased being a driver on February 18, 1992. A full-time busdriver left Respondent's employment on April 1, 1992. Driver Melton Thompson switched from full time to part time in August 1992. Another ceased being a busdriver on March 10, 1993. One driver retired on December 13, 1993.

Since certification of the Union, Respondent has not hired any full-time drivers. Mark Neilson testified that 7 full-time drivers and 40 part-time drivers are currently employed by Respondent. Some of the part-time drivers work very little but Respondent started hiring permanent part-time drivers in 1991 and it guaranteed those drivers a minimum of 30 hours per week.

Mark Neilson testified that before September 1991 for the most, part-time busdrivers were students. Duke University students were not permitted to work over 19.9 hours per week. Respondent did employ students from other colleges and those students were not limited to 19.9 hours per week.

Respondent director of transportation services, David Majestic, testified that students were employed as part-time drivers because of the nature of the services. Due to the school year it was impractical to employ only full-time drivers. It would have been necessary to lay off drivers during periods when school was not in session. Additionally, according to Majestic, some of the routes required as little as 2 hours per day and that would not conveniently fit in with full-time employment.

Majestic testified that part-time drivers have historically outnumbered full-time drivers. In September 1987 there were 53 part-time and 3 full-time drivers. In September 1988 there were 46 part-time and 6 full-time drivers. In September 1989 there were 45 part-time and 11 full-time drivers. In September 1990 there were 38 part-time and 13 full-time drivers. In September 1991 there were 40 part-time and 13 full-time drivers. In September 1992 there were 31 part-time and 9 full-time drivers. In September 1993 there were 37 part-time and 8 full-time drivers.

According to Majestic, Respondent went to more full-time drivers in 1989–1990 because student help was getting somewhat unreliable and there had been a pay increase for area schoolbus drivers and Respondent was competing for that market.

Mark Neilson testified that in 1991, Respondent decided to move away from hiring students and toward employing professional drivers. Mark Neilson started advertising for and hiring permanent employees that were not students. Pamela Hardiman testified that Respondent advertised for full-time permanent drivers in August 1991. Although Respondent did not hire full-time drivers after the Union was elected, it is undisputed that Respondent sought drivers with prior driving experience, beginning in August 1991. Those hired, including Pamela Hardiman, were told they were permanent part-time drivers. Those part-time drivers were guaranteed 30 hours of work each week. Hardiman was also told that she would be able to work as much as she wanted.

I credit the complete testimony of Pamela Hardiman. I base my finding on her demeanor. Much of Hardiman's testimony was not rebutted.

Director of Transportation Services David Majestic testified that permanent part-time drivers were hired for the first time in recent history in September 1991. The first permanent part-time driver was hired on either August 30 or 31, 1991. According to Majestic, Respondent decided to go to permanent part-time employees because they had used some ex-students that were casual, upwards of 40 hours a week. That proved to be a very efficient way of running the operation. Also, student drivers were dwindling and Respondent was looking for a more dependable work force.

I credit Majestic's above-mentioned testimony that permanent part-time drivers were hired beginning after the NLRB election for the first time in recent history.

Pamela Hardiman was hired by Respondent as a part-time busdriver on September 4, 1991. Four or five additional part-time busdrivers were hired around that same time. Hardiman responded to a notice for full-time employees posted at the employment office on Broad Street in Durham. Hardiman recalled that she first saw the employment office notice some 2 or 3 weeks before she was hired by Respondent. Before she was employed, Hardiman drove a schoolbus for Durham County Schools.

Before being hired, Hardiman was called in for an interview. She was told that Respondent was seeking part-time rather than full-time drivers as was indicated on the notice in the employment office. Subsequently Mark Neilson phoned Hardiman and asked her to attend a second interview. She was interviewed by Neilson and Supervisor Daniel Breeding. Neilson and Breeding told Hardiman that she would be guaranteed 30 hours per week and that she could work as many additional hours each week as she wanted. Hardiman testified that she did work as many hours as she wanted, sometimes 50 hours a week, sometimes 30 hours a week, whatever she signed up for. Hardiman and the other permanent part-time drivers wear uniforms. All full-time drivers wear uniforms.

David Majestic testified that since an accident ''last year,'' there has been a decision to not hire any more Duke students. Since September 1993 from one-half to two-thirds of the part-time drivers work 30 hours or more each week.

Pamela Hardiman testified that Respondent hired 3 additional permanent part-time drivers in 1992 and 10 additional permanent part-time drivers were hired in 1993.

David Majestic denied there had been a policy of eliminating the full-time drivers. Although I credit some of Majestic's testimony, I do not credit that testimony. Here, as with other witnesses, I base my findings on demeanor. Additionally, I find that this portion of Majestic's testimony does not accord with other undisputed or credited evidence. The credited evidence shows that Respondent planned to employ full-time drivers shortly before the NLRB election in August. The testimony of Pamela Hardiman, whom I credit if full, showed that Respondent advertised for full-time drivers in August 1991, before the NLRB election. Immediately after that election Respondent decided for the first time to hire permanent part-time drivers and not to hire full-time drivers.

The Overtime Issue

Pamela Hardiman, a permanent part-time driver, testified that part-time drivers are currently working overtime and driving charters.

Since Respondent started hiring permanent part-time drivers, overtime work has been assigned to both full-time and part-time drivers on a first come basis for open shifts and on a seniority basis for charter work, according to David Majestic. Seniority is handled by starting overtime assignments with the most senior driver. The entire seniority list is exhausted even though it may take several days before returning to the most senior driver on the seniority list. Majestic testified from documents received in evidence, that the amount of overtime increased from 1991 to 1992 and decreased from 1992 to 1993.

Full-time driver George Morton testified that before September 1991 he was able to get all the overtime he wanted. During that time he worked 20 to 25 hours and more overtime each week. Now he does not receive as much overtime. While previously he was able to check the available overtime work, now he is not advised about available overtime until, on occasion, he is approached by Supervisor Breeding and asked if he wants a particular overtime assignment. Additionally, the available overtime is more difficult. Morton testified that frequently the overtime offered by Breeding, requires working until 2 or 2:30 a.m. and he has to be back for his regular work at 7 a.m.

Full-time driver Wilson Louise Davis testified that she has been driving a bus for Respondent going on 14 years. Before Respondent hired permanent part-time drivers, Davis was able to get all the overtime she wanted. She worked 110 to 120 hours per 2-week pay period. After Respondent hired the permanent part-time employees Davis was not getting the overtime work she wanted. She went to Mark Neilson and asked him why she was not getting as much overtime. Neilson told Davis that he had to cut back on their overtime and he could use the part-time drivers and student drivers on overtime and avoid going over his budget. Davis testified that from 1992 she had to ask students to sign for overtime in order to enable her to work the overtime. Respondent questioned Davis as to records showing that her overtime actually increased in 1992 and 1993.

I do not credit Davis' testimony to the extent it tends to show that she received less overtime in 1992 or 1993 than she did before the hiring of permanent part-time drivers. The record includes documents that show that Davis' overtime was not reduced. I do credit her testimony regarding her conversation with Mark Neilson. That testimony was not rebutted even though Neilson testified.

I credit the testimony of George Morton. I base my determination on Morton's demeanor. I also credit David Majestic's testimony as to the procedure Respondent used in assigning overtime after permanent part-time drivers were hired. That testimony was in accord with other evidence in the record.

The Guaranteed Hours Question

The record evidence illustrated that permanent part-time drivers were hired starting after the election in August 1991. Those drivers were guaranteed a minimum of 30 hours a week throughout the year. Pamela Hardiman testified that when she was interviewed for part-time driving, by Mark Neilson and Daniel Breeding, they told her she was guaranteed 30 hours a week and as many additional hours each week as she wanted. Full-time drivers are guaranteed 40 hours a week throughout the year.

As shown above I credit the complete testimony of Pamela Hardiman.

Route Assignments

Director David Majestic testified that routes are reassigned twice each year. In August before the school year begins, and in May before the summer recess, drivers are given the opportunity to select their routes.

Since 1993 routes have been segregated as either full-time or part-time routes. Since that time full-time drivers have

been restricted to the selection of full 8-hour-per-day routes. Before 1993, full-time drivers were able to select other routes including, for example, class change routes.

According to David Majestic, drivers are permitted to select their routes in order of seniority.

After full-time drivers select all the full-time routes, permanent part-time employees are permitted to select the remaining full-time routes.

Majestic testified that the full-time drivers are assigned from 39 to 41 hours per week. He testified that permanent part-time drivers are assigned from 20 to ''thirty-eight, thirty-nine, forty'' hours per week.

When asked if a full-time driver would be permitted to select a part-time route, Majestic answered that was something he has not encountered and could not say how he would react.

In 1991 permanent part-time driver Pamela Hardiman drove a class change route and the Duke Manor Apartments route. She was assigned those routes by her supervisor, Daniel Breeding, and Mark Neilson.

In 1992 Hardiman drove a class change route and a hospital route. Pamela Hardiman picked those routes off the board. One side of the board was full time and the other side was part time. Pamela Hardiman testified that after the full-time drivers picked their routes from the full-time side of the board, there were three or four of those 40-hour full-time routes left. The part-time drivers were then permitted to pick from among those three or four full-time routes in addition to the routes listed on the part-time side of the board.

In August 1993 Hardiman selected three class change routes. She testified that no class change routes were included in the board listing for full-time routes. All the full-time routes listed on the board were 8-hour-per-day routes.

Gloria Chavis is a full-time driver. She started working for Respondent in August 1989. Chavis testified that in 1989 full-time drivers were permitted to select full 8-hour-per-day routes, or class change routes.

Since 1988 when Mark Neilson started working for Respondent, the number of bus routes has continuously expanded.

Routes are designated M, P, or D routes. M routes involve the medical facility. P routes involve the parking lots. D routes include campus and one apartment complex.

Before 1992 full-time drivers were permitted to select routes including the D routes. However, beginning in 1992 Mark Neilson started publishing for driver selection, routes designated PT for part-time and FT for full-time.

Class change routes run 15 or 20 minutes before a class change until 15 or 20 minutes after the class change. Those runs are made about six times each school day. During other times the bus and its driver are idle.

Full-time driver George Morton testified that he drove class change routes until 1993. Morton testified that class change routes were not included among the full-time routes posted on the board for the 1993 school year.

I credit the above evidence showing that Respondent changed its method of assigning routes to full-time drivers in 1993. That evidence shows that full-time drivers in the bargaining unit were limited to routes designated as full-time routes. Those routes were full 8-hour-a-day routes. Unlike the procedure before election of the Union, full-time drivers did not have the option of selecting routes other than full 8-hour routes such as class change routes.

Increase in Unit Work

David Majestic testified that Respondent had experienced an increase in number of bus routes. Respondent went from about 32,600 hours of service in 1990, 1991 to about 45,000, 46,000 this school year. There are now 20 bus routes and 1 van route. Ten operate year around and 11 are seasonal.

Alleged Change to More Difficult Work

Pamela Hardiman testified that the full-time routes are physically harder than other routes. She is of the opinion that those routes, which involve driving 8 hours each day in a bus that does not have power steering, would affect the driver's capacity to take charter work outside the normal shift hours.

Full-time driver George Morton agreed. Morton testified that most of the charter work he has been offered since Respondent started hiring permanent part-time drivers, were hard hours requiring him to work to 2 or 2:30 a.m.

I credit both Hardiman and Morton in their testimony noted above in this section of the decision.

The Permanent Part-Time Drivers

Although student part-time drivers did not wear uniforms, the permanent part-time drivers do wear uniforms. Full-time drivers also wear uniforms. The permanent part-time drivers like full-time drivers, do have occasion to work overtime.

Until August 1991, before the Union's election, Respondent did not employ permanent part-time employees. Since August 1991, Respondent has not hired permanent full-time employees. The regular bargaining unit work is now performed by permanent full-time and permanent part-time employees. Casual part-time employees perform some irregular work. Casual part-time employees are not guaranteed work. Both permanent part-time and full-time drivers are guaranteed work each week of the year.

FINDINGS

Section 10(b)

Respondent contended this matter should be barred by Section 10(b) of the Act in view of the evidence that the matter complained of involved alleged actions by Respondent which began in September 1991, a time beyond the 6-month limitation expressed in Section 10(b).

The General Counsel argued that the 10(b) time did not start to run until the Union first learned of the alleged illegal action by Respondent.

There is no dispute regarding Respondent's alleged conduct. In that regard the record shows that Respondent has refused to offer full-time driver jobs since the August 1991 election. However, the law is well established that the 6-month limitation expressed in Section 10(b) of the Act does not commence until the charging party knew, or should have known by the exercise of due diligence, of the alleged unfair labor practice. *Patsy Trucking*, 297 NLRB 860, 862 (1990); *NLRB v. Burgess Construction Corp*., 596 F.2d 378 (9th Cir. 1979), cert. denied 444 U.S. 940 (1979).

The limitations period does not begin to run until the party filing the charge knows or has reason to know that an unfair labor practice has occurred. *Land Air Delivery v. NLRB*, 862 F.2d 354, 360 (D.C. Cir. 1988).

Respondent argued that the Union knew of the alleged unfair labor practices before 1993.

On cross-examination Louise Davis admitted that she gave a written statement to Respondent in which she asserted that she was phoned by a woman from the Union that she believed to be an attorney, during the summer of 1992. Davis told that woman that the full-time drivers were not getting overtime. During the hearing, Davis testified the woman attorney was not from the union but was actually Margaret Rafferty from the NLRB. Davis denied that she had ever talked to any attorney from the Union. Davis admitted that she could not recall the attorney's name when she talked with Respondent attorney but that she did recall the name after counsel for General Counsel mentioned the name Margaret Rafferty.

I credit the testimony of Louise Davis that the woman that phoned her was not a union attorney but was Margaret Rafferty from the NLRB. I credit that testimony on the basis of Davis' demeanor.

Melton Thompson, a busdriver with Respondent, denied that he talked with Tommy Mullins before June or July 1993. However, in an prehearing affidavit Thompson gave to Respondent he testified as follows:

> 4. Since the union election in August 1991, I have had numerous telephone conversations with Tommy Mullins of the Amalgamated Transit Union. I usually call him at home to discuss issues relating to the busdrivers at the University. In some of the telephone conversations that occurred in 1992, I discussed with Mr. Mullins the changes that had occurred in the transportation department since the election. I informed Mr. Mullins in 1991 and 1992 that nonstudent part-time drivers were being hired. In 1992, I told Mr. Mullins that I believed the full-time busdrivers were not given the same opportunities for overtime work as they had been, but that the supervisors and managers were giving overtime to whomever they wanted. These changes did not affect me personally because I did not want to work overtime and I ultimately went on part-time status because I had opened my own business. I saw how these changes affected the other full-time drivers, and I explained this to Mr. Mullins.
>
> 5. Also in 1992, I explained to Mr. Mullins that I believed the University had changed the way routes and shifts were assigned in that the University began to distinguish between part-time routes and full-time routes.
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> 6. Mr. Mullins was very receptive to the information I gave him and he indicated on more than one occasion in 1992 that he would look into these changes.

When asked about the above affidavit Thompson testified that he was rushed and badgered into signing the statement.

I do not credit Mr. Thompson's testimony. I base my finding in that regard on his demeanor and the conflicts between his testimony at the hearing and his testimony in his affidavit. I found Thompson to be an incredible witness. Respondent argued that Thompson's testimony should not be credited but I should credit his affidavit testimony. I am unable to credit any of Thompson's testimony.

International vice president of Amalgamated Transit Union Tommy Mullins testified that he first learned that full-time drivers were not being replaced when they left Respondent's employment, on July 13, 1993, during a meeting with the employees.

The affidavit testimony of Melton Thompson appears to conflict with that of Tommy Mullins. As shown above I find that Thompson was not credible. A close examination of Melton Thompson's affidavit shows that he did not claim that he told Mullins that the full-time drivers were not being replaced. Mullins testified as follows regarding his first knowledge on July 13, 1993, of the matters contained in the Union's unfair labor practice charge:

> I learned that as full-time drivers left the service of Duke that they weren't being replaced and that part-time drivers were being hired who were non-student drivers and that they had—were being given thirty-five to forty hours a week.

The original charge filed by Mullins on August 10, 1993, alleged:

> Since on or about February 10, 1993, and at all times thereafter, it, by its officers, agents, and representatives, has unilaterally implemented a change in its hiring policies by refusing to hire full-time employees and thus only hiring part-time employees without bargaining with the employees' chosen representative—Local 1328 Amalgamated Transit Union.

Respondent Director of Transportation Services David Majestic testified that he was not aware of any communication to the Union regarding the decision that Respondent would not restaff driver positions with full-time people.

I credit the testimony of Tommy Mullins that he did not learn Respondent's full-time drivers were not being replaced until July 13, 1993. I base my credibility determination of demeanor and the fact that no evidence was offered to show the Union learned of Respondent's failure to replace full-time drivers before July 1993.

The record shows that Respondent failed to replace full-time drivers as vacancies were created after the August 1991 election of the Union as representative of the full-time drivers. The record also shows that the Union did not learn of that new practice until July 1993.

The charge in this matter was filed by the Union on August 10, 1993. Therefore, the 10(b) time bar ran from February 10, 1993. Respondent's first opportunity to replace a full-time driver occurred in early 1992, which was well outside the 10(b) period. However, the Union first learned about Respondent's alleged unfair labor practices within 1 month of the date it filed the charge.

In determining whether Section 10(b) bars the Union's charge it is necessary to consider whether the Union knew or by exercise of due diligence should have known, of Respondent's alleged unlawful acts more than 6 months before the filing of the charge. *Patsy Trucking*, supra.

Although the Union had been certified bargaining representative of the full-time busdrivers in 1992, Respondent has continued to refuse to recognize and bargain with the

Union. In that regard see *Duke University*, 306 NLRB 555 (1992), where the Board considered the Respondent's request for review of the Regional Director's determination that a unit of full-time busdrivers was an appropriate unit. There, when the Board decided that the unit was appropriate on February 28, 1992, the Board found that, among other things, the record showed that Respondent ''directly employs about 14 full-time drivers, and plans to hire several more.''

> [T]his cannot be deemed notice to the Union where the Union is being denied its lawful status as bargaining representative. In such a situation, a Union has no stewards to whom it can look to police working conditions, and members of an in-plant organizing committee are not the same as stewards. . . . *Clark Equipment Co*., 278 NLRB 498, 529 (1986).

There was no evidence, credible or otherwise, showing that the Union actually knew of Respondent's failure to replace full-time drivers when vacancies occurred until July 1993. Moreover, there was no showing that the Union should have known of Respondent's practice in that regard before July 1993. The Union did not enjoy recognition and was not able to perform its function as collective-bargaining representative for grievance procedure or otherwise. Cf. *Moeller Bros. Body Shop*, 306 NLRB 191 (1992), where the Board found that the union, in the exercise of reasonable diligence, should have become aware of the alleged unfair labor practices more than 6 months before it filed the change. See also *Farmingdale Iron Works*, 249 NLRB 98, 99 (1980), enfd. mem. 661 F.2d 910 (2d Cir. 1981); *Alaska Pulp Corp*., 300 NLRB 232 (1990).

The Unfair Labor Practice Allegations

After the Union was elected bargaining representative of the full-time drivers, the Union requested that Respondent bargain. Respondent refused.

Thereafter, Respondent failed to fill bargaining unit positions as full-time drivers left the unit. The record shows that Respondent decided to stop its practice of hiring student drivers. Although Respondent elected to employ permanent drivers and to extend to those permanent drivers a guaranteed workweek throughout the year, Respondent elected to keep those drivers outside the bargaining unit by calling them part time. Respondent implemented a new practice of employing permanent drivers as part-time employees.

Beginning in late August and September 1991, Respondent hired permanent drivers. The testimony of Pamela Hardiman showed that Respondent advertised for permanent full-time employees. After the election Respondent told driver applicants the prospective jobs were permanent part time with a guarantee of 30 hours per week and the permanent part-time driver could work as many additional hours as desired. On the basis of my observation of her demeanor I credit the testimony of Pamela Hardiman. Hardiman is currently employed by Respondent. Her testimony mentioned in this paragraph was not disputed.

The record shows that the permanent part-time drivers hired beginning in 1991 were similar to full-time drivers in many respects. They, like full-time drivers and unlike other part-time drivers, wore uniforms. They, like full-time drivers and unlike other part-time drivers, were guaranteed work each week throughout the year. Other part-time drivers occasionally worked overtime. However, there was no evidence that those other part-time drivers were ever guaranteed a minimum number of work hours during any particular week.

Respondent argued that the fact that permanent part-time drivers were hired before any of the full-time drivers left, shows that the part-time drivers were not used to replace unit employees.

It should be noted that a bargaining unit is comprised of jobs or job classifications and not of the particular persons working at those jobs. Thus, enlarging a unit by hiring additional unit employees when additional unit work is available does not impair the integrity of the unit. However, hiring people outside the unit to do that work does impair the unit's integrity. *NLRB v. Brown-Graves Lumber Co*., 949 F.2d 194 (6th Cir. 1991).

As shown here, the Board when reviewing the determination that the bargaining unit here was an appropriate unit, mentioned that Respondent employed around 14 full-time busdrivers and anticipated hiring more.

That point, whether in fact Respondent intended to hire more full-time drivers, shows that the integrity of the unit is the issue. Respondent may not unilaterally transfer unit work to a new class of employees.

As shown above the permanent part-time employees hired beginning in late August 1991 performed bargaining unit work. As shown here, their work assignments including assigned routes and overtime work, was work that could have been performed by bargaining unit employees. Moreover, the record showed that unit work has continued to increase during the period after the Union was selected bargaining representative of unit employees.

Part-time student drivers also performed work that could have been performed by unit employees. However, as shown above, Respondent had decided to move away from employing student drivers because they had become unreliable. That factor plus evidence that Respondent advertised for full-time employees in August 1991 shows that Respondent intended for the additional work to be performed by employees in the unit. It was only after the election of the Union, that Respondent elected to designate those new employees as permanent part time.

Respondent cited *Craft Electric Co*., 293 NLRB 1074 (1989), for the proposition that it could replace full-time drivers with part-time drivers. However, in *Craft* the employer was involved in a 150-day completion date and it proved through credited evidence that when three journeymen left the job, the remaining work did not require journeyman skills. Therefore, it was found that Respondent did not make a unilateral change by employing other than journeymen. Here, there was no credible evidence showing that the permanent part-time work could be distinguished from bargaining unit work. In fact, the evidence showed that opposite was true. Additionally, the evidence proved that before the election, Respondent planned to employ additional full-time drivers (Pamela Hardiman testified that Respondent's notice that it was seeking applicants for busdriver in August 1991, indicated the positions would be full-time).

Respondent also cited *Optica Lee Borinquen, Inc*., 307 NLRB 705 (1992). However, there the credited evidence proved that respondent hired more general practitioners rather than bargaining unit optometrists, because of market con-

ditions dictated by a shortage of optometrists. In the instant case the credited evidence showed that Respondent advertised for full-time drivers and it was Respondent's election to hire permanent part-time drivers. There was no showing of a shortage of employees seeking full-time positions. In fact, here again, the evidence proved the opposite was true. The permanent part-time drivers served in the fashion of full-time drivers by working guaranteed workweeks of at least 30 and sometimes 50 hours each week.

The record shows that permanent employees hired to perform the same work performed by bargaining unit employees, were classified part time even though their conditions of employment differed from what Respondent had classified as part time before that date. Respondent made that change without first giving the Union an opportunity to bargain.

While the record shows that some of the full-time drivers may have actually worked more overtime in 1992 or 1993, it is apparent that Respondent changed its practice of assigning overtime after the Union's election. Charter overtime was assigned by ''seniority.'' That seniority system enabled drivers to claim overtime only when the supervisor asked the driver if he or she wanted overtime. After the August 1991 election Respondent selected both full-time and permanent part-time drivers for overtime. Additionally, when Respondent changed its method of assigning work in 1993, full-time drivers were restricted to full 8-hour shifts. The evidence illustrated that frequently overtime would necessitate working until 2 or 2:30 a.m., making it difficult for a full-time driver to work that overtime. Moreover, the fact that some of the full-time drivers worked more overtime in 1992 or 1993, does not prove that those drivers did not lose overtime during that period. As shown above, the total time spent driving buses for Respondent has continued to increase. Full-time drivers may have lost opportunities for overtime regardless of whether their total overtime hours increased or decreased.

In summary, the evidence proved that Respondent made unilateral changes after the Union was elected which impacted on overtime for bargaining unit employees. Those changes effected full-time drivers in two respects. As shown here, full-time drivers were limited to full 8-hour shifts. That impacted on overtime by making it more difficult to handle fraternity charters which oftentimes required driving until 2 or 2:30 a.m. Some full-time drivers were required to report back for 7 a.m. shifts. This made the fraternity charters difficult to handle for those full-time drivers. David Majestic testified that fraternity charters constitute most of the charter work.

Second, the overtime opportunities were not posted. Instead the supervisor went to the next driver on the seniority list and asked if he or she wanted a specific overtime. That change resulted in fewer opportunities to bid on overtime and limited the scope of available overtime opportunities.

By failing to bargain about its changes in methods of assigning regular work and overtime, before implementation, Respondent engaged in conduct in violation of Section 8(a)(1) and (5) of the Act. That change impacted on regular and overtime work for unit employees and is a substantial, material, and unlawful unilateral change constituting a violation of the Act. *NLRB v. Brown-Graves Lumber Co*., 949 F.2d 194, 197 (6th Cir. 1991).

Respondent changed to a policy of refusing to hire unit employees; and to a policy of guaranteeing part-time drivers 30 hours of work each week throughout the year. That change impacted on bargaining unit employees. Respondent failed to offer the Union an opportunity to bargain before making those changes and thereby engaged in conduct in violation of Section 8(a)(1) and (5) of the Act. *Land O' Lakes*, 299 NLRB 982 (1990); *Brown-Graves Lumber Co*., 300 NLRB 640 (1990) enfd. 949 F.2d 194 (6th Cir. 1991); *Harris-Teeter Super Markets*, 307 NLRB 1075 (1992).

The record also shows that Respondent unilaterally changed its route assignment procedure. Full-time drivers were limited to full, 8-hour routes from 1993. As shown above that change impacted on bargaining unit employees by limiting their overtime options. Some of the overtime including that requiring late night driving, was more difficult due to the change in route assignment procedures. Additionally the change in route assignments resulted in what was perhaps more difficult work of having to drive 8 hours without power steering without a break.

CONCLUSION OF LAW

Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally removing regular and overtime work from bargaining unit employees and by unilaterally changing the method of assigning routes to drivers.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

I recommend that, on request, the Respondent bargain with the Union and, if an understanding is reached, embody the understanding in a signed agreement. On request Respondent must specifically bargain with the Union concerning the decision to employ permanent part-time employees. On request Respondent must restore the status quo ante and rescind the unilateral changes made after the August 1991 election and make all affected unit employees whole for any losses they incurred by virtue of its unilateral changes from August 1991 until it negotiates in good faith with the Union to agreement or valid impasse. If the Union elects to have previous conditions restored, calculations of the sums and payments necessary to make employees whole, with interest, shall be computed in accordance with normal Board policy. See *Ogle Protection Service*, 183 NLRB 682 (1970); *New Horizons for the Retarded*, 283 NLRB 1173 (1987); *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979).

On these findings of fact and conclusion of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, Duke University, Durham, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with Amalgamated Transit Union, Local 1328 as the exclusive bargaining rep-

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

resentative of the employees in the bargaining unit described below by unilaterally changing working conditions of bargaining unit employees by removing regular and overtime work from bargaining unit employees and by unilaterally changing the method of assigning routes to drivers.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with Amalgamated Transit Union Local 1328 as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time busdrivers employed by the Respondent at its campus at Durham, North Carolina, excluding supervisors as defined in the Act.

(b) On request bargain in good faith with the Union concerning the decision to employ permanent part-time drivers, rescind the unilateral changes affecting bargaining unit employees that were made after the August 1991 election and make unit employees whole, with interest, for any losses they incurred by virtue of its unilateral changes from August 1991 until it negotiates in good faith with the Union to agreement or to a valid impasse in the manner set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at it's Durham, North Carolina facilities copies of the attached notice marked ''Appendix.'' Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.